

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

KEVIN KIRSCH,

Plaintiff,

v.

Case No. 08-C-913

**JANE DOES, Sued as Nurses #1 and #2
and JOHN DOES, Sued as Doctor,**

Defendants.

ORDER

Plaintiff has filed a motion to dismiss this action without prejudice because he has been unable to ascertain the identities of the defendants within the time allotted by the court. Plaintiff asserts that he attempted to contact counsel for defendants seeking their cooperation in identifying defendants, but did not receive any response. Thus, plaintiff seeks dismissal so that he can obtain an attorney and file another complaint. In response, counsel for defendants seeks dismissal with prejudice for failure to prosecute. He avers that plaintiff never left him a voice mail requesting assistance in identifying the defendants.

Plaintiff seeks dismissal under Federal Rule of Civil Procedure 41(a), which provides in relevant part that a plaintiff may dismiss an action by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment. Fed. R. Civ. P. 41(a)(1)(A). The rule also provides that the dismissal is without prejudice, unless the notice states otherwise. Fed. R. Civ. P. 41(a)(1)(B). Defendants, on the other hand, seek dismissal under Rule 41(b), which provides for dismissal for failure to prosecute.

Dismissal under this section is with prejudice, that is, it “operates as an adjudication on the merits,” unless the order states otherwise. Fed. R Civ. P. 41(b).

In this case, voluntary dismissal without prejudice under Rule 41(a) is applicable because defendants have not yet filed an answer or motion for summary judgment. Indeed, they have not even been identified. **IT IS THEREFORE ORDERED** that plaintiff’s motion to dismiss action without prejudice (Docket #35) is **GRANTED**.

Dated at Milwaukee, Wisconsin, this 14 day of August, 2009.

/s _____
LYNN ADELMAN
District Judge